LEOW TEOW BENG

v.

LIEW CHUN WAH & ORS; LIEW CHEE SENG (INTERVENOR)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[PROBATE NO: S2(S5)-32-207-95]
14 JANUARY 2000

CIVIL PROCEDURE: *Affidavits - Exhibit - Exhibit annexed to affidavit-in-support of application - Whether opposing party could use exhibit to contest application - Whether opposing party must file an affidavit in reply annexing exhibit thereto - Rules of the High Court 1980, O. 32 r. 13(2)(b)*

The intervenor applied, *inter alia*, for stay of execution of a consent order in encl 95. Encl. 95 was supported by an affidavit-in-support in encl. 94 annexed with exhs. A, B, C, D, E, F, and G.

The caveators herein did not file an affidavit in reply to encl. 94 but sent a written notice to the intervenor that they would be relying on exh. G annexed to encl. 94 ('exh. G') to contest the application in encl. 95. The intervenor objected that by relying on exh. G, the caveators contravened O. 32 r. 13(2)(b) of the Rules of the High Court 1980 ('RHC'). The hearing was adjourned. At the adjourned hearing, the caveators submitted that they would be relying on all the exhibits annexed to encl. 94. They claimed that they were relying on O. 32 r. 13(1)(b) RHC by merely giving notice of such an intention.

The issue was whether the caveators could rely on exh. G to contest encl. 95 without having to file an affidavit in reply enclosing the said exhibit.

Held:

[1] Order 32 r. 13(1)(b) is restricted and governed by the words "filing an affidavit" and by the words "any affidavit filed by him in previous proceedings". The caveators did not file any affidavits in previous proceedings relating to the present proceedings to warrant them to give written notice to the intervenor of their intention to use exh. G. Further, exh. G was an affidavit in reply in relation to another High Court case. As such, it could not be used to contest the application in encl. 95 in the present proceedings without deposing an affidavit and annexing it thereto.

[2] If the caveators intend to use exh. G, a formal application to extend time to file the affidavit in reply out of time must be made expeditiously and timeously. The affidavit in reply annexing exh. G must be in accordance

with s. 8 of the National Language Act 1963/1967, *ie*, in the Malay language and that affidavit in reply must be stamped with the correct fee within the meaning and ambit of O. 41 r. 10(2) of the Rules of the High Court 1980.

[3] The filing of an affidavit in reply enclosing exh. G was a strict requirement of O. 32 r. 13(2)(b) of the RHC. It followed that the caveators would not be able to rely on the other exhibits as well.

[Preliminary objection allowed; interim stay of execution of consent order granted.]

Case(s) referred to:
Asia Video Enterprise v. Liew & Co [1995] 1 CLJ 807 ***(refd)***
Calex-HLK Ltd lwn. Nordin Abdul Hamid & Yang Lain [1997] 5 CLJ 58 ***(refd)***
Chor Phaik Har & Ors v. Choong Lye Hock Estates Sdn Bhd & Ors [1996] 2 MLJ 206 ***(refd)***
Citibank Bhd v. Leong Wey Pyu & Anor [1998] 3 CLJ Supp 1 ***(refd)***
KS Chua & Co v. Chui Miang Chew & 5 Ors [1996] 2 CLJ 676 ***(aff)***
Lim Keng Siong & Anor v. Yeo Ah Tee [1983] 2 MLJ 39 ***(refd)***
Majlis Daerah Dungun v. Tenaga Nasional Bhd [1998] 1 MLJ 708 ***(refd)***
Palaniappa Chettiar v. Tan Jan & Anor [1965] 31 MLJ 182 ***(refd)***

Legislation referred to:
National Language Act 1963/1967, s. 8
Rules of the High Court 1980, O. 32 r. 13(1)(a), (b), (2)(b), O. 41 r. 10(2)

For the intervenor - KM Chan; M/s Lim Kian Leong & Co
For the caveators - Murthi; M/s Murthi & Partners

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

On 5 January 2000, encl. 95 which was an application by the intervenor for the following orders:

(a) to stay execution of the consent order dated 13 November 1997 pending the final outcome of the civil case in Shah Alam High Court *vide* civil suit no: 22-779-98;

(b) for costs of the application be costs in the cause;

(c) and any other order which this court thinks fit.

was scheduled for hearing before me but somehow it did not get off the ground. Enclosure 95 was dated 29 October 1999 and it was filed on the same

day. Enclosure 95 was supported by an affidavit in support affirmed by the intervenor himself on 29 October 1999 and filed on the same day as seen in encl. 94. Annexed to the affidavit in support in encl. 94 were documents marked as exhs. "A", "B", "C", "D", "E", "F" and "G" and each of these exhibits were bound up together and separately attested by the commissioner for oaths.

The caveators did not file an affidavit in rebuttal to that of encl. 94. The caveators through Mr. Murthi admitted that they had no intention to file an affidavit in rebuttal and they said that they would be relying on exh. "G" that was annexed to encl. 94 to contest the application in encl. 95. Mr. Murthi submitted that he had given written notice to the intervenor of the caveators' intention to use exh. "G" of encl. 94 with a copy to the court. But unfortunately that written notice was nowhere to be found in the court file. Mr. K.M. Chan for the intervenor objected vigorously to the stand adopted by the caveators and argued that what was done was in contravention of O. 32 r. 13(2)(b) of the Rules of the High Court 1980 ("RHC"). Nevertheless, Mr. K.M. Chan admitted that he was in receipt of that written notice. The arguments were adjourned to the next day, *ie*, on 6 January 2000, to enable Mr. Murthi to do some research and that adjournment was granted with the concurrence of Mr. K.M. Chan. That adjournment was at the behest of Mr. Murthi.

At the next adjourned hearing, Mr. Murthi threw the net of his arguments wider when he submitted that he would be relying on all the exhibits annexed to the affidavit in support in encl. 94. There was no written notice of such an intention transmitted to the intervenor or to the court. That submission must be a submission made with the benefit of an overnight research or was it an exercise in the mechanics of an afterthought.

Notwithstanding that there was no affidavit filed by the caveators, Mr. Murthi had the audacity to rely on O. 32 r. 13(1)(b) of the RHC by merely giving notice to the intervenor to say that the caveators are "intending to use in any such proceedings any affidavit filed by him in previous proceedings" in contesting encl. 95. Order 32 r. 13(1) of the RHC reads as follows:

> Any party –
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> (a) filing an affidavit intended to be used by him in any proceedings in Chambers; or
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> (b) intending to use in any such proceedings any affidavit filed by him in previous proceedings,
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> must give notice to every other party of the filing or, as the case may be, of his intention to do so.

and its scope is not that wide as one would expect it to be for it is restricted and governed by the words "filing an affidavit" as per O. 32 r. 13(1)(a) of the RHC and by the words "any affidavit filed by him in previous proceedings" as per O. 32 r. 13(1)(b) of the RHC. In so far as O. 32 r. 13(1)(b) of the RHC is concerned the pertinent question to pose would be: Whether the caveators have filed any affidavits in previous proceedings relating to probate no: S2(S5)-32-207-95 (in reference to the present proceedings) to warrant them to given written notice to the intervenor of the caveators' intention to use exh. "G" of encl. 94 to oppose encl. 95? The answer would simply be in the negative. According to Mr. Murthi he was entitled to rely on exh. "G" that was annexed to encl. 94 in order to contest the application in encl. 95. Mr. K.M. Chan in a style of his own submitted that by virtue of para. 14 of encl. 94, the intervenor merely proposed to rely on para. 4 of exh. "G" that was annexed to encl. 94. Now, exh. "G" that was annexed to encl. 94 and bandied around by both parties in the course of their submissions was in fact an affidavit in reply of Liew Choy Peng who affirmed that affidavit on 18 September 1998 in relation to a case in the High Court of Shah Alam *vide* civil no: MT 2-22-779-98 where the parties were:

(1) Liew Chum Wah
(2) Liew Choy Lan
(3) Liew Choy Kheng
(4) Liew Choy Peng
(5) Liew Choi Hung … Plaintifffs

AND

(1) Liew Chee Seng
(2) Wong Yeok Song
(3) Yeap Cheng Hoe
(4) Harta Pusaka Liew Ping @ Liew Ping Lam

… Defendants

How could the caveators rely on the affidavit in reply of Liew Choy Peng that was filed in relation to a case in the High Court of Shah Alam *vide* civil no: MT2-22-779-98, referring to exhibit "G", to contest the application in encl. 95 in the present proceedings before me without deposing an affidavit and annexing exh. "G" itself? Order 32, r. 13(2)(b) of the RHC states as follows:

(2) Save as otherwise provided in these rules –

(b) a party wishing to reply an affidavit served on him must file his affidavit

and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

and it was introduced by amendments made to the RHC *vide* PU (A) 192/93 specifically to prevent adjournments on the grounds of filing affidavits in reply or further affidavits, as the case may be. Without a doubt, its introduction facilitates speedy disposal of chamber matters. I did say in *KS Chua & Co. v. Chui Miang Chew & 5 Ors* [1996] 2 CLJ 676; [1995] 3 AMR 2605, [1995] 4 MLJ 436, that this rule must be read strictly and that the courts are not obliged and indeed are precluded from considering any affidavits filed out of the 14 day period unless applications to file those affidavits out of time are formally made and granted by the court. Affidavit in reply must be filed and served within 14 days of the party receiving the affidavit which is intended to be replied. Affidavits that were filed out of time without leave of the court must be struck out forthwith. The courts generally are vested with the discretion to extend time for the filing of the affidavit in reply out of time (*Asia Video Enterprise v. Liew & Co* [1995] 1 CLJ 807). The cases of *Majlis Daerah Dungun v. Tenaga Nasional Bhd* [1998] 1 MLJ 708 and *Citibank Bhd v. Leong Wey Pyu & Anor* [1998] 3 CLJ Supp 1 categorically laid down the following salient rule: the 14 day limit only applies to an affidavit in support of an application in chambers and to an affidavit in reply to the affidavit in support, but not to subsequent affidavits.

In my judgment, exh. "G" of encl. 94 cannot be relied upon by the caveators to contest encl. 95. Bluntly put, exh. "G" of encl. 94 cannot speak nor appear in this court for the benefit of the caveators unless it is annexed as an exhibit to the affidavit in reply of the caveators by way of a rebuttal to encl. 94. Alternatively, there has to be an affidavit in reply filed by the caveators adopting the averments in exh. "G" of encl. 94. Imagine what would happen if this court were to allow the caveators to use and to read exh. "G" of encl. 94 to contest encl. 95 without the need to comply with the strict requirements of O. 32 r. 13(2)(b) of the RHC. There would certainly be chaos in our courts. A bad precedent should not be established by the court. In the event the caveators are still adamant in using and reading exhibit "G" of encl. 94, a formal application to extend time to file the affidavit in reply out of time must be made expeditiously and timeously. It is salutary to remember that in filing an affidavit in reply by annexing exh. "G" of encl. 94, the caveators must do so in accordance with s. 8 of the National Language Act 1963/1967 – meaning in the Malay Language, and that affidavit in reply must be stamped with the correct fee within the meaning and ambit of O. 41, r. 10(2) of the RHC. Stamping with the appropriate fee is the only sure way to enable the affidavit in reply – if the caveators propose to file one, to be used in these proceedings (*Calex-HLK Ltd lwn. Nordin bin Abdul Hamid & Yang Lain* [1997] 5 CLJ 58).

Undaunted and going on an uphill task, Mr. Murthi submitted that the intervenor had exhibited exh. "G" in encl. 94 and the intervenor based encl. 95 on this very exhibit. Thus, the caveators too, so say Mr. Murthi was entitled to rely on exh. "G" in encl. 94 in contesting encl. 95. Mr. Murthi further submitted that exh. "G" in encl. 94 was lawfully before this court and the caveators as the opposing party was entitled to rely on that exh. "G" to demonstrate the infirmity of the intervenor's application in encl. 95. The intervenor cannot choose to rely on exh. "G" in encl. 94 and at the same time deny the caveators the right to rely on it – so ran the submission of Mr. Murthi. He submitted that the case *Calex-HLK Ltd (supra)* can easily be distinguished. Every case law is distinguishable. Nobody says that *Calex-HLK Ltd (supra)* is all encompassing and covers everything under the sky. *Calex-HLK Ltd (supra)* decided on the issue of non payment of the prerequisite fee with the consequent result that the affidavit in that case that was not drafted and filed in the Malay language was held to be inadmissible.

Mr. K. M. Chan in rebuttal rightly pointed out the need to comply with the RHC in strict terms and he again emphasised the failure to file an affidavit in reply enclosing exh. "G" of encl. 94 as required under O. 32 r. 13(2)(b) of the RHC. Mr. K. M. Chan further submitted that in the absence of an affidavit in reply enclosing exh. "G" of encl. 94, there was legally speaking no reply by the caveators at all. Furthermore – and this must be the crucial point, Mr. K. M. Chan submitted that the words "previous proceedings" appearing in O. 32 r. 13 (1)(b) of the RHC were not shown to mean and refer to "other proceedings".

As to whether exhibits should form part and parcel of an affidavit, Thomson LP in *Palaniappa Chettiar v. Tan Jan & Anor* [1965] 31 MLJ 182, at p. 183 had this to say:

> The question, however, did arise as to whether or not certain exhibits to an affidavit formed part of the affidavit and in that connection Lord Herschell L.C. said that these exhibits:
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> > form as much part of the affidavit as if they had been actually annexed to and filed with it.
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> What is even more in point is what was said by A.L. Smith L.J. What he said was this:
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> > When a person makes an affidavit, and states therein that he refers to a document marked with the letter A, the effect is just the same as if he had copied it out in the affidavit. It is only made an exhibit to save expense.
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> In the present case the appellant or his agent said this in the course of his affidavit which was signed:

> A copy of the statement of account in compliance with sections 19 and 21 of the Moneylenders Ordinance is annexed hereto marked 'P3'.
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> So it is. There it is bound up with rest of the affidavit not with thread or wire but with the attestation of the commissioner for oaths.
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> In the circumstances it is impossible to resist the conclusion that the certificate is part of the affidavit and that the signature is attached to the affidavit as a whole and therefore to every part of it.

Abdul Hamid FJ (who later rose to be the Lord President of the Supreme Court) in *Lim Keng Siong & Anor v. Yeo Ah Tee* [1983] 2 MLJ 39 FC had this to say of *Palaniappa*'s case (see p. 47 of the report):

> Counsel for the appellants argues that *Palaniappa Chettiar*'s case is distinguishable. We do not see any significant distinction. *Palaniappa Chettiar*'s is in effect an authority for the proposition that 'exhibits to an affidavit formed part of the affidavit as if they had been copied out in the affidavit …' Since the documents were in fact attached to the affidavit, we see no reason to hold that the learned Judge was disentitled to look at the affidavit and the documents annexed to it.

The law develops tremendously and its development is always unimpeded and the future augurs well in this aspect of legal development. Advancing with the times, Gopal Sri Ram JCA delivering the judgment of the Court of Appeal in *Chor Phaik Har & Ors v. Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 2 MLJ 206 in refined language observed at p. 219 of the report:

> We now turn to consider one other point raised by Mr Sethu. It has to do with the affidavit of Robert Choong Ewe Jin in the 1968 suit to which we referred very early in this judgment. That affidavit was produced by the appellants as an exhibit under an affidavit sworn, filed and used in the court below. Robert Choong has, in that affidavit, accepted that the deceased had a share in the lands in question.
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> Mr Sethu says that since it was the appellants who produced and relied on the affidavit, it is the same as them having called Robert Choong as a witness and he having given evidence adverse to them. In accordance with settled principles, that evidence would, counsel submits, bind the party who tendered it. See *M Ratnavale v. S Lourdenadin* [1988] 2 MLJ 371 at p 380.
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> With respect, we do not think it possible to equate the annexing of an affidavit as an exhibit to another affidavit to the calling of a witness who ends up giving adverse evidence. The latter is a much clearer case. The former is not, for a party may produce the affidavit filed in other proceedings to demonstrate that the particular deponent had made a previous inconsistent statement or an admission. So, it depends very much on the purpose or object which the party producing such an affidavit seeks to achieve.

and that ought to whittle away the submissions of Mr. Murthi. It would be tantamount to making a statement at the bar if Mr. Murthi was allowed to rely on exh. "G" of encl. 94 to contest encl. 95 without having to affirm an affidavit in reply enclosing that exh. "G" – a strict requirement of O. 32 r. 13(2)(b) of the RHC must be adhered to. The outcome of this short judgment in regard to the preliminary point advanced by Mr. Murthi must surely be decided in favour of the intervenor. The caveators should not be allowed to rely on exh. "G" of encl. 94 to contest encl. 95. That preliminary point must be dismissed in favour of the intervenor with costs. As an offshoot of this ruling, it was therefore next to impossible for the caveators to rely on the other exhibits annexed to encl. 94 in their unholy haste to challenge encl. 95. In the interim period, pending the final disposal of encl. 95 an interim stay of the execution of the consent order dated 13 November 1997 should be granted indefinitely.